

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD MOSZYK,

Plaintiff-Appellee/Cross-Appellant,

v

CITY OF BAY CITY, ROB ANDERSON, and
JAMES PALENICK,

Defendants-Appellants/Cross-
Appellees.

UNPUBLISHED
December 20, 2005

No. 252273
Bay Circuit Court
LC No. 01-003936-CZ

ON REMAND

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for further proceedings in conformity with its order reversing that portion of this Court's judgment that affirmed the trial court grant of summary disposition on plaintiff's claim asserted under the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq.*, and remanding for consideration of an issue raised but not decided in defendants' original appeal.¹ The sole issue for this Court to address on remand is whether the arbitration of plaintiff's termination precludes plaintiff from pursuing a WPA claim. We affirm the trial court's refusal to give collateral effect to the arbitrator's award with regard to plaintiff's WPA claim.

To establish a *prima facie* claim under the WPA, a plaintiff must show that: (1) he was engaged in protected activity as defined by the WPA; (2) he was discharged or discriminated

¹ In our initial opinion, we affirmed the dismissal of plaintiff's WPA claim, and reversed the trial court's denial of summary disposition with regard to plaintiff's claims for wrongful discharge and defamation, on the basis of governmental immunity. See *Moszyk v Bay City*, unpublished per curiam opinion, issued January 25, 2005 (Docket No. 252273). In reversing this Court with regard to the WPA claim, the Supreme Court found that there was a "disputed issue of material fact whether plaintiff's protected activity caused defendants to terminate plaintiff in violation of the Whistleblower's Protection Act claim." *Moszyk v Bay City*, 474 Mich 861; 703 NW2d 800 (2005). In all other respects, the application for leave and a cross-application to appeal were denied. *Id.*

against; and (3) a causal connection exists between the protected activity and the discharge or adverse employment action. MCL 15.362; *West v General Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). An employee is engaged in protected activity under the WPA if he has reported, or is about to report, a suspected violation of law to a public body. *Shallal v Catholic Social Services of Wayne County*, 455 Mich 604, 610; 566 NW2d 571 (1997). A public body is any body that is created or funded by state or local authority. A member/employee of such a body meets the definition of a public body. *Manzo v Petrella*, 261 Mich App 705, 713-714; 683 NW2d 699 (2004).

Collateral estoppel precludes the relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior action culminated in a valid final judgment and the issue was actually and necessarily litigated in that action. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). In the subsequent action, the ultimate issue to be determined must be identical and not merely similar to that involved in the first action. *Eaton County Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). To be actually litigated, a question must be put into issue by the pleadings, submitted to the trier of fact, and determined by the trier. *VanDeventer v Michigan National Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988). The parties must have had a full and fair opportunity to litigate the issue in the first action. *Kowatch v Kowatch*, 179 Mich App 163, 168; 445 NW2d 808 (1989). Mutuality of estoppel is generally a necessary element of collateral estoppel. *Minicuci v Scientific Data Mgmt, Inc*, 243 Mich App 28, 33; 620 NW2d 657 (2000).

We conclude that the arbitration of plaintiff's claim does not preclude plaintiff from pursuing a claim under the WPA in the trial court. Collateral estoppel applies to factual determinations made during arbitration proceedings. *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). The issue before the arbitrator was whether plaintiff's actions in refusing to apply the 1996 Building Officials and Code Administrators (BOCA) Code after being ordered to do so constituted insubordination as that term was defined by the City's rules and regulations. The arbitrator's findings as to that issue were not relevant to plaintiff's assertion that defendants violated the WPA by terminating his employment. The arbitrator did not determine whether plaintiff's act of refusing to apply the 1996 BOCA Code constituted protected activity as that term is defined by the WPA, or whether a causal connection existed between plaintiff's engagement in protected activity and his termination. *West, supra* at 183-184. Specifically, the arbitrator did not determine whether Anderson's insistence that plaintiff apply the 1996 BOCA Code was an order to engage in an illegal activity, or whether by discussing the matter with Green, plaintiff reported a suspected violation of law to a public body. *Shallal, supra* at 610. The issues to be litigated in plaintiff's WPA claim differ from the issue litigated in the arbitration proceeding. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 340; 657 NW2d 759 (2002). The arbitrator did not actually and necessarily litigate those issues. *Ditmore, supra* at 577.

In *Cole v West Side Auto Employees Federal Credit Union*, 229 Mich App 639, 647; 583 NW2d 226 (1998), this Court held that findings made by an arbitrator are conclusive in a subsequent suit between the same parties, including a case in which the arbitration involved a claim of wrongful discharge, and the subsequent civil suit involved a claim that the employees' termination violated the employee's state civil rights. The holding in *Cole* is inapplicable in this

case because plaintiff's civil suit was filed and her WPA claim had been dismissed prior to the issuance of the arbitrator's decision.

We find that the arbitration of plaintiff's termination does not preclude plaintiff from pursuing a WPA claim in the trial court.² Thus, we affirm the trial court in this regard, and remand for further proceedings regarding plaintiff's WPA claim.

/s/ Kathleen Jansen

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

² We do not address the more discrete issue of whether any of the arbitrator's factual findings have collateral estoppel effect in the proceedings that will occur on remand, see *Cole, supra* at 646-647, because that issue is different than the issue presented to us on remand.